

February 24, 2012

Mark B. Rotenberg, Esq.
General Counsel
University of Minnesota
360 McNamara Alumni Center
200 Oak Street SE
Minneapolis, MN 55455-2006

Re: Conflict of Interest Opinion

Dear Mr. Rotenberg:

Per your request, enclosed is my opinion respecting the Regent Steven Sviggum conflict of interest matter.

I. FACTS

The University of Minnesota (the “University”) was formed by the Minnesota Territorial Legislature in 1851, when the Territorial Legislature adopted “[a]n act to incorporate the University of Minnesota, at the Falls of St. Anthony.” Act of Feb. 25, 1851, ch. 3, 1851 Minn. Laws 9, 9, *available at* <http://www1.umn.edu/regents/polchart.html>. The Act established the Charter of the University. The Charter provided that the “government” of the University be vested in a board of 12 regents (each a “Regent,” and collectively, the “Board of Regents” or the “Board”), *id.*, § 4, “elected in Joint Convention of both branches of the Legislature.” *Id.*, § 5. The Governor was given the responsibility to appoint persons to fill vacancies on the Board should they occur. *Id.*, § 6. The Regents were given the “power, and it shall be their duty to enact laws for the government of the University.” *Id.*, § 14. The legislature was authorized to “at any time, alter, amend, modify or repeal” the act establishing the University and its Charter. *Id.*, § 20.

In 1857, when Minnesota became a State, the Act of the Territorial Legislature incorporating the University and providing its Charter was “perpetuated” through the insertion of the following language into the Minnesota Constitution: “[a]ll rights, immunities, franchises and endowments heretofore granted or conferred upon the University of Minnesota are perpetuated unto the

Attorneys & Advisors
main 612.492.7000
fax 612.492.7077
www.fredlaw.com

Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota
55402-1425

university.” Minn. Const. art. XIII, §3. This meant that the University became a “constitutional corporation” having perpetual life. As such, the Charter could no longer be amended by the Legislature; it could only be amended in the same manner as the Minnesota Constitution, by the people of the State of Minnesota. As a consequence the University enjoys a certain “constitutional autonomy” from other branches of government which bears in part on the issues to which this Opinion is addressed.

On February 21, 2011, Steven A. Sviggum (“Regent Sviggum”) was elected a Regent of the University by the Minnesota Legislature. On January 16, 2012, Regent Sviggum announced that he had accepted an employment as the Executive Assistant to the Majority Caucus of the Minnesota Senate (“Senate Majority Caucus”). Regent Sviggum commenced his employment with the Senate Majority Caucus on January 17, 2012.

II. QUESTIONS PRESENTED

On February 10, 2012, Board of Regents Chair Linda Cohen announced that she had “directed the Office of General Counsel to engage an independent attorney at my discretion and with my approval to consult and render an opinion” on the following questions:

1. Does an employment-related conflict of interest exist with respect to Regent Sviggum’s service as a Regent of the University and his employment as Executive Assistant to the Senate Majority Caucus?
2. If so, what is the degree or pervasiveness of that conflict?

III. CONCLUSION

1. In my opinion, Regent Sviggum’s continued service as a University Regent and employment as Executive Assistant to the Senate Majority Caucus creates a conflict of interest under the University’s governing documents.
2. Further, in my opinion, the conflict created by Regent Sviggum’s continued service as a University Regent and employment with the Senate Majority Caucus is an employment-related conflict as defined in the Regents’ Code of Ethics (see Section IV-C-3 of this Opinion), and further creates a fundamental, systemic clash between the duties owed to the University by Regent Sviggum, as a Regent, and the duties owed by Regent Sviggum to the Senate Majority Caucus, as an employee. As long as these two positions are held simultaneously by Regent Sviggum, this systemic conflict cannot be eliminated, managed or cured, including by means commonly used to address transactional, periodic or incidental conflicts.

IV. DISCUSSION AND ANALYSIS

A. Conflicts of Interest and Regent Sviggum's Employment and Regent Duties.

1. General. Conflicts of interest are not uncommon with respect to relationships, transactions, interests and decisions involving busy, engaged people called upon to serve in various leadership capacities. Conflicts of interest are often thought of in a pejorative manner. A person whose conduct, interests, relationships or employment raises questions of actual or perceived conflicts of interest may feel attacked or unfairly accused as though a wrong is being done, or may be done, or an improper gain or benefit may be, or is being, realized. This can be unfortunate, particularly in a matter such as this. In fact, a concern about whether a conflict exists respecting a particular matter or relationship is cautionary in nature. It alerts us to examine facts, circumstances, relationships, and other information to see that various interests are being properly served or protected, and to exclude the persons involved from participating in discussions and decisions, or even simultaneously holding certain positions so that actions taken might be respected as having been made free of actual or apparent conflict.
2. Regent Sviggum's Duties and Qualifications as Executive Assistant to the Senate Majority Caucus. One can understand why Regent Sviggum might be highly desired to serve the Senate Majority Caucus. His knowledge of the Legislature and many of its members, his former position as Speaker of the House, his respect within the Republican Party leadership, his influence within the Republican Party, and a host of other attributes may make him extremely effective in the position. The published duties as Executive Assistant to the Senate Majority Caucus include:
 - Act as Communications Director of the Senate Majority Caucus.
 - Under the direction of the Senate Majority Leader, provide media relations and public information assistance to the Senate Majority Caucus.
 - Coordinate press activity and media messages on behalf of the Senate Majority Leader and Senate Majority Caucus.
 - Resolve complex media relations issues and provide assistance to members of the Senate Majority Caucus.
 - Oversee and manage the Senate Majority Caucus communications staff.
 - Maintain daily awareness of local, state and national government issues.

Minn. Senate Job Posting, Executive Assistant to the Majority Caucus (Dec. 22, 2011). Among the published qualifications for the position are political astuteness, ability to relate well with the public, and ability to deal with a variety of complex and confidential tasks.

The Minnesota Senate Code of Ethics applies to Senators and Senate staff, and requires that Regent Sviggum avoid actions which impair his independence of judgment as Executive Assistant or give the appearance of impropriety, and maintain and respect confidentiality as he performs his Executive Assistant duties. Minn. Senate – Policies (Conduct & Ethics), 1.30 Code of Ethics 1 (Feb. 26, 2008), *available at* http://www.senate.leg.state.mn.us/departments/scr/subcommittees/ethical_conduct/senate_policies/1_30.pdf.

Further, Senators and Senate staff are required to:

- Put the public interest ahead of their personal advancement and financial interest.
- Disclose conflicts of interest and refrain from participating in decisions that will have a substantial effect on their personal financial interest that is different from the group they represent.
- Maintain and respect confidentiality.

Id. In addition to the above requirements, Regent Sviggum's employer is entitled to expect that Regent Sviggum will serve the Senate Majority Caucus with high standards of honesty and personal integrity, be discreet in what he discloses about work done for the Senate Majority Caucus or any other legislator (a duty of confidentiality as to such matters), provide candid advice as sought by Senator Senjem and other members of the Majority Caucus, disclose his knowledge of matters which are material to his work for, and the interests of, the Senate Majority Caucus, however such knowledge is obtained, act generally in the best interests of the Senate Majority Caucus, and avoid any activities or relationships which might call into question Regent Sviggum's objectivity or candor.

3. Regent Sviggum's Duties as a Regent. In addition to his duties as an employee of the Senate Majority Caucus discussed above, Regent Sviggum has identical duties of acting with high standards of honesty and personal integrity, using discretion in what he discloses about the work of the Board of Regents, providing candid advice, disclosing knowledge (wherever obtained), acting generally in the best interests of the Board of Regents and the University, and avoiding any activities or relationships which might call into question Regent Sviggum's objectivity or candor in his service as a University Regent. The specific duties of the Board of Regents and of individual Regents are summarized in Section IV-C-5 of this Opinion under the heading: ***Responsibilities of the Board and Individual Regents***. I highlight here a few of those duties that in my view may be problematic for Regent Sviggum to observe, or conflict with his duties as Executive Assistant to the Senate Majority Caucus.

- *To maintain the highest ethical standards, abiding by Board policies with respect to ethics and conflicts of interest.* I note that it is a violation of the duties of an individual Regent to fail to abide by Board policies with respect to ethics and conflicts of interest.
- *To support Board decisions when determined.* The process for determining Regent conflicts of interest is clear (see ***Code of Ethics for Members of the Board of Regents***, Section IV-C-3 of this Opinion). While the Chair, or an ad hoc committee appointed by the Chair, has the authority to determine conflicts, the Board of Regents retains ultimate authority respecting such determination. However the matter is determined, the duty of an individual Regent is to respect the decision of the Chair, ad hoc committee or Board.
- *To defend the autonomy and independence of the University.* Given his duties to the Senate Majority Caucus, it is inevitable that there will be many occasions on which, in perception if not reality, Regent Sviggum is unable to put all other considerations aside, particularly those of his employer, to which he also owes a duty of loyalty, and defend the autonomy and independence of the University.
- *To enhance the public image of the University and the Board.* Public or private comments by a Regent respecting the views of the Board Chair, other Regents, University General Counsel, other officers of the University and decisions of the Board may not be consistent with a Regent's duties to enhance the public image of the University and the Board or evidence respect for the Board's decisions and the University's mission.
- *To recognize that the President is the primary spokesperson for the University, and the Chair of the Board is the only other person authorized to speak for the Board.*
- *To foster openness and trust among members of the Board, the administration ... State government and the public.* This requires a high degree of sensitivity to the impact of one's remarks in private and in public.
- *To maintain respect for the opinions of Board colleagues, and a proper restraint in criticism of colleagues and officers.* I note that Linda Cohen is Chair of the Board of Regents and Mark Rotenberg is General Counsel and an officer of the University.
- *To recognize that no Board member shall make any request or demand for action that violates the written policies, rules or regulations of the Board or the University.*

In Regent Sviggum's Oath of Office as a Regent, taken on March 10, 2011, Regent Sviggum has sworn that he "will faithfully discharge the duties of the Office of Regent of the University of Minnesota." Oath of Office of Steven Arthur Sviggum, Regent of the U. of Minn. (March 10, 2011).

The impossibility of performing simultaneously to the high standards expected by his employer and by the Board of Regents of the University, as described above, should be apparent, and, in my opinion, cannot be overcome by a process of disclosure and recusal or any type of management plan.

4. The Duty of Loyalty. The duty of loyalty is articulated in Minnesota Statutes (e.g., the Minnesota Business Corporation Act, Chapter 302A; the Minnesota Non-Profit Corporation Act, Chapter 317A), in the Regent's Code of Ethics and in the common law. Longstanding statutory language and common law principles have required that directors act loyally to the organizations they serve. The Delaware Courts have consistently provided the most referenced advice in the United States on the fiduciary duties of directors: care, loyalty and good faith. In addressing the duty of loyalty in the case of *Guth v. Loft*, the Delaware Supreme Court stated: "[t]he rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Del. 1939). The duty of loyalty does not change even when the director has conflicting obligations to another entity. "There is no 'safe harbor' for such divided loyalties in Delaware." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983). Further, there is no dilution of this obligation where one director holds dual or multiple directorships. When a director acts in a dual capacity, he or she "owe[s] the same duty ... to both corporations." *Id.* Further, the Minnesota Supreme Court once held that a director may not abstain from discharging his or her fiduciary duty to participate actively and fully in the management of corporate affairs. *Ray v. Homewood Hospital*, 27 N.W.2d 409, 411 (Minn. 1947).

As applied to Regent Sviggum's service as a Regent, this duty requires that he place the interests of the University above all other interests, personal or otherwise. A similar duty applies to Regent Sviggum as he serves the interests of his employer, the Senate Majority Caucus. The University has many ongoing material dealings with the Legislature, including biennial operating funding and bonding requests, to name two of the most critical. The University employs lobbyists to represent many of its interests in the Legislature. Many decisions of the Legislature have a material impact on the University. The Legislature must consider the interests of the State of Minnesota and many other constituencies as well. Partly for this reason, the University was provided with constitutional autonomy from the legislative and executive branches of Minnesota government. Precisely for this reason, I consider the exercise of Regent Sviggum's duty of loyalty to the Board of Regents and simultaneously to the Senate Majority Caucus to be continually in conflict, a conflict which because of its systemic continuing nature cannot be resolved by disclosure, recusal or a management plan.

B. The University's Constitutional Autonomy

The special status of the University as a constitutional corporation has periodically been addressed by the Minnesota Supreme Court. In *State ex rel. U. of Minn. v. Chase*, 175 Minn. 259, 265, 220 N.W. 951, 954 (Minn. 1928), the court held: “the university, in respect to its corporate status and government, was put beyond the power of the legislature by paramount law, the right to amend or repeal which exists only in the people themselves. The result was a ‘constitutional corporation,’ said to be the ‘highest form of juristic person known to the law.’”

The Court noted that the constitutional provision added nothing to the quantity of the powers granted to the university, but did add the quality of perpetuity, as the grant “was not merely confirmed -- it was ‘perpetuated.’” *Id.* at 266, 220 N.W. at 954. The Court continued, “we find the people of the state, speaking through their constitution, have invested the regents with a power of management of which no legislature may deprive them. That is not saying that they are . . . beyond the law making power of the legislature. But it does mean that the whole executive power of the university having been put in the regents by the people, no part of it can be exercised or put elsewhere by the legislature.” *Id.* at 266, 220 N.W. at 954. And the Court continued: “[g]enerally, the distinction between the jurisdiction of the legislature and that of the regents is that between legislative and executive power.” *Id.* at 267, 220 N.W. at 954.

Regarding the power to direct the management of the University, the Court stated:

The constitution of the state has declared, in effect, that the management of the university shall be, until the people themselves say otherwise, in a relatively small, slowly changing board, chosen for their special fitness for and interest in the work... [T]he purpose of the Constitution remains clear. It was to put the management of the greatest state educational institution beyond the dangers of vacillating policy... and partisan ambition that would be possible in the case of management by either legislature or executive chosen at frequent intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher education.... Constitutional limitations are not to be ignored because no harm has come from past infractions or because a proposed violation has a commendable purpose.

Id. at 274-75, 220 N.W. at 957. As described in Section IV-A-4, the University has many dealings with the Legislature. Also, the Legislature must biennially elect four Regents qualified to serve. Given the many interactions between the University and the Legislature, the issue of the University's constitutional autonomy from the Legislature was important in reaching my conclusions.

C. The University's Governing Documents

1. **Charter.** The Charter establishes the University as a corporate entity, establishes the Board of Regents as the governing body of the University and grants the Board of Regents full authority over the governance and management of the University. See Section I of this Opinion.

2. **Bylaws.** The Bylaws, adopted by the Board of Regents, and amended from time to time, contain many provisions affecting the procedures and processes of the Board of Regents. Of importance to this Opinion is that Article VIII, Section A provides that “[t]he members of the Board of Regents shall be guided by the provisions set forth in the Code of Ethics policy adopted by the Board on October 12, 1973, and as amended from time to time.” U. of Minn. Bylaws of the Board of Regents (July 12, 2001), *available at* <http://www1.umn.edu/regents/polaws.html>.

Further, Article X of the Bylaws authorizes the Regents to suspend “[a]ny provision of these Bylaws other than those contained in Article VIII, Section A.” *Id.* Thus, in all matters considered by the Board, the Code of Ethics must guide the Board’s determinations.

3. Code of Ethics for Members of the Board of Regents

The Regents Code of Ethics, as last amended February 10, 2012, contains a number of principles important to this Opinion:

i. Section I, subdivision 1 characterizes the Board’s responsibility for the governance of the University as a “constitutionally conferred public trust.” U. of Minn. Board of Regents Policy, Code of Ethics for Members of the Board of Regents 1 (Feb. 10, 2012), *available at* http://www1.umn.edu/regents/policies/boardoperations/Code_of_Ethics.pdf. Consistent with its constitutional origins, subdivision 1 requires that: “[i]n serving the people of Minnesota, Regents shall adhere to the highest ethical standards.” *Id.* While it may be desired of all who serve in governing positions, this requirement of the Regents exceeds the requirements of the legal duty of loyalty for those who serve as the governing authorities of Minnesota non-profit and for-profit organizations.

ii. Section I, subdivision 2 requires Regents “to put aside parochial interests, keeping the welfare of the entire university, not just a particular constituency, at all times paramount.” *Id.*

iii. Section V, subdivision 6 defines an employment-related conflict of interest as follows: “[a]n *employment-related conflict of interest* exists whenever a Regent’s employment relationship may impair independence of judgment.” *Id.* at 3. Note, that with respect to this provision, the use of the word “may.” There is no requirement of actual impairment for an employment-related conflict to exist.

iv. Section VI is devoted to financial and employment-related conflict of interest procedures. Subdivision 1 requires that “[t]he conflict of interest provisions of this policy shall be interpreted and applied *to best serve the interests of the University.*” *Id.* (emphasis added).

v. Section VI, subdivision 4 clearly articulates how issues regarding conflicts of interest should be resolved. The Chair of the Board of Regents has the authority to determine the matter. If the Chair so desires, the Chair may appoint an ad hoc group consisting of the Chair, Vice Chair and one other Regent to determine the matter. In either case the Chair or the ad hoc group shall report their determination to the Board. The provisions clearly state that “in all cases the Board is the final authority on conflict questions.” *Id.*

I further note that, with respect to the Section VI provisions relating to recusal, there are certain matters as to which disclosure and recusal are not sufficient to avoid a conflict or the perception of a conflict. I note that in the definition of recusal in Section V, subdivision 1, the point of recusal is “to ensure that the Regent’s independence of judgment is not compromised, that the public’s confidence in the integrity of the Board is preserved, and that the University’s public mission is protected.” *Id.* at 2.

My opinion is that in the situation presented, the objectives with respect to independence of judgment, public’s confidence in the integrity of the Board and protection of the University’s public mission cannot be served by recusal. My opinion in this case is that the public’s confidence, the integrity of the Board and the protection of the University’s public mission require that Regent Sviggum relinquish one of the two positions he currently holds.

vi. I further note that Section VII requires that a Regent resign from the Board of Regents upon officially announcing candidacy for any partisan elective public office. *Id.* at 4. I recognize that Regent Sviggum is not running for election. It is clear from the Regents’ Code of Ethics that the leader of the Majority Senate Caucus, Senator David Senjem, could not run for, or hold, his current office and serve as a Regent. In my opinion the reasons for prohibiting the holder of a public office from serving as a Regent equally apply to the Executive Assistant position held by Regent Sviggum. In fact, because of the duties attendant to serving in the position of Executive Assistant to the Senate Majority Caucus, there is a legitimate concern that Regent Sviggum has more partisan responsibilities than the elected Senator, who, once elected, would also have a duty to serve all of the people of Minnesota, not just those who are members of the Senate Majority Caucus. The noted prohibition provision in the Regents’ Code of Ethics has even more relevance to Regent Sviggum’s position because of the partisan nature of his employment position.

4. *Code of Conduct*

The Board of Regents has also adopted a Code of Conduct which applies to identified members of the University community, including members of the Board of Regents. Section II, subdivision 2 of the Code is a commitment on the part of persons subject to the Code “to the highest ethical standards of conduct and integrity.” U. of Minn. Board of Regents Policy, Code of Conduct 2 (Dec. 8, 2006), *available at* http://www1.umn.edu/regents/policies/academic/Code_of_Conduct.pdf. Section III of the Code details various standards of conduct, the first being that “[e]thical conduct is a fundamental expectation for every community member.” *Id.* Community members are required to practice and model ethical conduct. In Section II, subdivision 5, community members are required to meet legal requirements to foster legal compliance and an ethical culture. In this regard, community members are expected to “learn and follow the laws, regulations, contracts, and University *policies and procedures* applicable to University activities.” *Id.* at 3 (emphasis added). In subdivision 8, community members are expected to be “objective and impartial in making decisions on behalf of the University” and in this regard to “avoid actual individual or institutional conflicts of interest; disclose potential conflicts of interest and adhere to any management plan created to eliminate any conflicts of interest.” *Id.* at 4. As indicated previously in Section III-2 of this Opinion there is such a fundamental, systemic, continuing clash between Regent’s Sviggum’s duties to the University as a Regent, and his duties to the Senate Majority Caucus that no process of disclosure and recusal, and no management plan, can mitigate or resolve the conflict.

5. *Responsibilities of the Board and Individual Regents*

This policy, adopted by the Board of Regents, sets forth the Board’s and an individual Regent’s responsibilities in serving the University.

The responsibilities of the Board of Regents are identified in subdivision 1 of this policy, and include:

- (e) Accept fiduciary responsibility for the long-term welfare of the University.
- (f) Ensure adequate resources – human, financial, physical – and effective management of those resources.
- (g) Preserve institutional autonomy, recognizing that the preservation of autonomy requires accountability.
- (i) Serve as a court of appeals when appropriate.

U. of Minn. Board of Regents Policy, Responsibilities of the Board and Individual Regents 1 (Oct. 10, 2003), *available at* <http://www1.umn.edu/regents/policies/boardoperations/BoardResponsibilities.pdf>.

Subdivision 2 of the policy identifies the responsibility of individual Regents. The following are germane to this Opinion:

- (a) To support the mission of the University.
- (b) To maintain loyalty to the entire institution rather than to any part of the University or constituency within it.
- (c) To maintain the highest ethical standards, abiding by Board policies with respect to ethics and conflicts of interest.
- (e) To speak forthrightly at Board meetings and to support Board decisions when determined.
- (i) To defend the autonomy and independence of the University.
- (j) To represent all the people of Minnesota and no particular interest, community, or constituency.
- (k) To enhance the public image of the University and the Board.
- (l) To recognize that authority rests only with the Board as a whole and not in its individual numbers.
- (m) To recognize that the president is the primary spokesperson for the University, and the Chair of the Board is the only other person authorized to speak for the Board.
- (n) To foster openness and trust among members of the Board, the administration, the faculty, the students, state government, and the public.
- (o) To maintain respect for the opinions of Board colleagues and a proper restraint in criticism of colleagues and officers.
- (p) To recognize that no Board member shall make any request or demand for action that violates the written policies, rules or regulations of the Board or the University.

Id. at 2-3. For a discussion of concerns related to Regent Sviggum's observation of certain of the listed responsibilities of a Regent see Section IV-A-3 of this Opinion.

V. FURTHER CONSIDERATIONS

1. National Conference of State Legislatures Model Code of Conduct for Legislative Staff

I note that Minnesota is a member of the National Conference of State Legislatures (“NCSL”) and has a member of the Minnesota House of Representatives on NCSL’s Executive Committee. The NCSL is a bipartisan organization that serves legislatures and legislative staffs of all states, as well as U.S. commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on important state issues. NCSL also represents the interests of state governments before congress and federal agencies. NCSL addresses a variety of issues impacting legislatures, legislators and legislative staff.

In 1996, NCSL published a model code of conduct for legislative staff. Like all model codes, NCSL codes are not binding until adopted by a state. Minnesota has not adopted the model code of conduct for legislative staff. Nonetheless, the code is instructive regarding the duties of legislative staff. The following is a summary of certain duties of legislative staff from the model code which are instructive, or may be useful as a frame of reference, in considering the expectations of Regent Sviggum in his capacity as Executive Assistant to the Senate Majority Caucus.

- “A legislative staff member is a public servant.” Nat’l Conf. of State Legislatures, Model Code of Conduct for Legislative Staff 1 (1996), *available at* http://www.ncsl.org/documents/lsss/Code_of_Conduct.pdf. The staff member owes his or her loyalty to the legislative branch. Regent Sviggum’s duties to his employer go well beyond loyalty to the legislature as a whole; his duty of loyalty is to the Senate Majority Caucus.
- “A trustworthy legislative staff member is discreet in what he or she reveals about work done for any legislator, and subject to the law..., maintains confidentiality of communications between the staff member and any legislator.” *Id.* at 2. A comment to this provision indicates that knowing when information should be treated confidentially, and treating it as such, is important. However, Regent Sviggum’s duty of loyalty to the Board of Regents would require that he disclose his knowledge of matters important to the Board and the University, regardless of whether he gained that knowledge through his employment by the Senate Majority Caucus.
- “A trustworthy legislative staff member provides objective advice, information and alternatives to legislators, independent of the... interests of third-parties.” *Id.* at 2. “A

trustworthy staff member avoids activities that conflict with the objectivity or give the appearance of conflict.” *Id.* at 2.

The above duties would be a normal expectation of the Senate Majority Caucus which employs Regent Sviggum. These duties also describe expectations of those who serve as Regents (i.e., public servant, loyalty (to the University), high personal integrity, discretion, confidentiality, candor and objectivity).

People of integrity can, in good faith, have the best of intentions, and believe that they can serve two positions, even positions which are as inextricably bound together by the nature and frequency of interaction as is the case with the University and the Legislature. But best intentions are not at issue here. The University Regent is asked to go beyond traditional expression of the duty of loyalty and serve with the highest ethical integrity so that in substance and appearance the decisions, processes and integrity of the University are not called into question, and therein lies the unresolvable, systemic clash of duties presented by the two positions held by Regent Sviggum.

2. Incompatibility of Offices

A long-standing principle of Minnesota law has been that certain public offices may be “incompatible” with other public offices, meaning that a conflict of interest would exist if one person were to hold both offices at the same time. The Minnesota Constitution provides that legislators may not hold any other federal or state public office except postmaster or notary public, Minn. Const. art. IV, § 5, and that Minnesota Supreme Court, court of appeals, and district judges may not hold any other state office and may not hold any federal office except a military reserve commission. Minn. Const. art. VI, § 6. Various statutes, Attorney General opinions, and Minnesota court decisions have likewise found incompatibility between two public offices in a variety of circumstances.

In *State ex rel. Hilton v. Sword*, 157 Minn. 263, 264, 196 N.W. 467 (Minn. 1923), the Minnesota Supreme Court held that “[p]ublic offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both.” The general consequence of a finding of incompatibility is that “[t]he acceptance of a second incompatible office works a vacation of the first.” *Id.* at 266, 196 N.W. at 468.¹

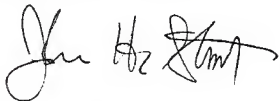
¹ Similarly, I note a current board governance practice in many public companies and some privately held and nonprofit corporations to avoid similar issues arising from a director's employment change. These boards require that when a director changes employment he or she must notify the board and tender his or her resignation as a director. The board then considers the implications of the employment change for the board and the corporation, and accepts or rejects the tendered resignation.

Further, serving in either position without pay does not eliminate the incompatibility of the offices because there is continuing potential for conflict between duties of the two offices, according to an Attorney General ruling. Minn. House of Representatives Research Dep't, Information Brief on Compatibility of Offices 3 (Oct, 2005).

I reference the above because it is another example of public concern about holding two offices, the nature of which makes various duties, including the duty of loyalty, impossible to simultaneously observe.

In conclusion, it is important to be clear that the Board of Regents enjoys autonomy granted by the Minnesota Constitution in the governance and management of the University. The Board has established and published Board and individual Regent responsibilities. In its Code of Ethics, the Board has also established the process for determining Regent conflicts of interest. The Board has the final authority in the matter addressed by this Opinion, and it is the duty of each Regent to respect the decision.

Very truly yours,

A handwritten signature in black ink, appearing to read "John H. Stout", with a stylized flourish at the end.

John H. Stout

Attorney

Direct Dial: 612.492.7012

Email: jstout@fredlaw.com

JHS/kjm